DIGEST OF OTHER RECENT VIRGINIA DECISIONS.

(Head notes prepared by M. P. Burks, State Reporter.)

JOHNSTON & CHEEK v. GREEN, TRUSTEE.—Decided at Richmond, January 24, 1904.—*Harrison* J. Absent, *Cardwell*, J.

1. TRUST FUNDS—*Disbursements—Deposit with preferred creditor—Interest.* Where a trustee deposits the trust fund, subject to his check, with a banker who is a preferred creditor, and the account is an active and varying one, subject to no special agreement between the parties, and a decree is pronounced directing the trustee to deduct his commission, a reasonable fee to his attorneys, and the unpaid costs of suit, and to distribute the balance to the creditors according to their rights and priorities as ascertained by a commissioner's report which had been confirmed, the debt of such banker is not to be credited by any portion of such deposit until actual payment thereof is made to him, although he is the first preferred creditor, the amount of the deposit large, and actual payment long delayed. He has no control over the fund, and the amount to be paid to him is not ascertained. The trustee alone is chargeable with the disbursement of the fund, and interest continues to run on the creditor's debt until payment is actually made.

CONSUMERS' BREWING COMPANY v. DOYLE'S ADMINISTRATRIX.—Decided at Richmond, February 4, 1904.—*Harrison*, J. Absent, *Cardwell*, J.

1. NEGLIGENCE—*Burden of proof.* In an action to recover for a negligent injury the burden is on the plaintiff to establish the negligence of the defendant by affirmative evidence which shows more than a mere probability of a negligent act. The proof need not be direct and positive by an eye-witness, but it must be such as to satisfy reasonable and well-balanced minds that it resulted from the negligence of the defendant. If the injury may have resulted from either one or the other of two causes for only one of which the defendant is responsible, or if it is just as probable that it was caused by the one as the other, in either event the paintiff must fail.

2. NEGLIGENCE—*Concurrent negligence of parties.* If the continuing negligence of a plaintiff up to the time of the injury, concurs with the negligence of the defendant in causing the injury, the plaintiff cannot recover.

3. DAMAGES—*Negligence—Accident.* A defendant is not liable for damages resulting from an event which was not expected, and could not have been anticipated by a person of ordinary prudence.

RICHMOND STANDARD STEEL, SPIKE & IRON COMPANY v. CHESTERFIELD COAL CO.—Decided at Richmond, February 14, 1904.—*Buchanan*, J. Absent, *Cardwell*, J.

1. PLEADING—*Variance between allegation and proof—Evidence—Parol evidence to vary written contract.* Where an undated written contract is

offered in evidence in support of a plea, and is rejected on account of a material variance between the contract and the plea as to matters other than the date, it is not error to reject evidence as to its date or the circumstances leading up to its execution. If the date is the only incompleteness alleged in the contract offered, and there is no claim that the contract does not in other respects contain all the terms of the contract between the parties, and there is a material variance between the other terms of the contract offered in evidence and that set forth in the plea, then the date is an immaterial matter and parol evidence will not be received to vary the terms of the written contract offered in evidence.

2. PLEADINGS — *Proof — Variance — Amendment — Code, sec. 3384.* If upon the trial of an action at law there is a variance between a contract set out in a plea, and the contract offered in evidence in support of the plea, and no motion is made to amend the plea so as to conform to the evidence tendered in support of it, nor to allow the jury to find the facts so that the court may give judgment according to the right of the case, as provided by Code, sec. 3384, then the contract offered in evidence should be excluded.

NORTHINGTON BY &C. V. NORFOLK RAILWAY & LIGHT COMPANY.

—Decided at Richmond, February 10, 1904.—*Whittle*, J.

1. APPEAL AND ERROR—*Two trials—Rule of decision.*—Where there have been two trials of a case, and the verdict on the first trial has been set aside, the statute expressly provides that upon a writ of error, the rule of decision in the appellate court shall be that the appellate court shall "look first to the evidence and proceedings on the first trial, and if it discovers that the trial court erred in setting aside the verdict on that trial, it shall set aside and annul all proceedings subsequent to said verdict and enter judgment thereon." Acts 1891-2, p. 962.

2. NEGLIGENCE—*Proof required—Probability—Case at bar.* In an action to recover damages for an injury alleged to have been inflicted by the negligence of the defendant, the plaintiff must show more than a probability of actionable negligence on the part of the defendant. If there is no reliable, substantial evidence to support a verdict for the plaintiff in such an action it should be set aside. In the case at bar, the plaintiff alleged that while she was attempting to board one of the defendant's street cars the car was suddenly and prematurely started and that she was thrown off "just as soon as the car started." In a receipt given by her to the defendant she admits that the injury was inflicted as a result of stepping from a moving car. Her statement on the trial in conformity with the charge in her declaration is contradicted by two out of the four witnesses examined in her behalf, and by four disinterested witnesses examined on behalf of the defendant, as well as by the report of the accident made by the conductor of the street car which was brought out by the plaintiff on the cross-examination of one of defendant's witnesses. Under such circumstances a verdict for the plaintiff should be set aside.